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No. 92-446

IN THE

Supreme Court Of The United States

October Term, 1992

SEARS, ROEBUCK AND CO.,

Petitioner,

v.

VERNAL FORBUS, EARL J. BEACHAM, RUDOLPH CADDELL, FRANK R. DAVIS, AND VERNIE RHODES, JR.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether employees who have executed a release and waiver based on the employer's misrepresentations and fraud must unconditionally tender back the consideration before commencing an ADEA suit against the employer.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings below are reflected in the case caption. Respondents Vernal Forbus, Earl J. Beacham, Rudolph Caddell, Frank R. Davis, and Vernie Rhodes, Jr., are listed individually.

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The Respondents, Vernal Forbus, Earl J. Beacham, Rudolph Caddell, Frank R. Davis, and Vernie Rhodes, Jr., respectfully pray that this Court will enter an order denying the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit filed by the Petitioner, Sears, Roebuck and Co. ("Sears").

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 958 F.2d 1036. (Petitioner's App. A, pp. A3-A16). The relevant District Court's orders are those contained in Petitioner's App. B, pp. A17-A18 and App. C, pp. A19-A20. The District Court's Memorandum Opinion contained in Petitioner's App. D, pp. A21-A28 is not relevant to the matters sought to be reviewed by this Petition. (See Petition for Writ of Certiorari, p. 3, fn. 2).

JURISDICTION

The Respondents' concur in the Petitioner's Statement of Jurisdiction insofar as the Petition is timely in that review is sought pursuant to 28 U.S.C. § 1254(1).[1]

STATUTE INVOLVED

In addition to those provisions of the Age Discrimination in Employment Act, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA") set forth in Petitioner's Appendix at App. G, pp. A33-A35, the Respondent sets forth an additional relevant provision of the ADEA, as follows:

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[1] In the Court below, Sears' appeal was from an interlocutory order which was neither final pursuant to 28 U.S.C. § 1291 nor certified for appeal under 28 U.S.C. § 1292(b). Sears contended that appellate jurisdiction was appropriate under the Collateral Order Doctrine. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The Eleventh Circuit held the Collateral Order Doctrine applicable (Petitioner's App. A, pp. A8-A9) with one member of the panel, Judge Cox, dissenting (Petitioner's App., pp. A14-A16). Respondents were not aggrieved by the Eleventh Circuit's application of the Collateral Order Doctrine nor do the Respondents seek review of that portion of the Eleventh Circuit's Opinion. Nevertheless, Respondents are mindful that the parties cannot confer subject matter jurisdiction on the Court.

§ 623. Prohibition of age discrimination

(a) Employer practice

It shall be unlawful for an employer —

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

STATEMENT OF THE CASE

The Respondents will restrict this Statement of the Case solely to those aspects of Petitioner's Statement of the Case to which Respondents take issue. Sears recites certain facts, particularly those involving the circumstances surrounding the Respondents' signing the releases and waivers, as if they were not subject to dispute.[2] The circumstances surrounding the Respondents' signing of the releases and waivers, as alleged by the Respondents in their complaint, form one of the factual basis for the Respondents' ADEA claims.[3]

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[2] Petitioner cites to the district court's Memorandum Opinion in support of factual statements in its Statement of the Case. Those citations are irrelevant and inappropriate as the writ before this Court is from the Eleventh Circuit Court of Appeals.

[3] Not surprisingly, the Petitioner has disputed the factual allegations made by the Respondents throughout these proceedings. The Petitioner recognized, as did the district court, that factual disputes cannot be resolved on summary judgment. Consequently, Sears contended before the district court and on appeal that, even assuming the releases and waivers were induced by

In October of 1989, the Respondents were told that Sears' Retail Distribution Center ("RDC") at the Omega Street facility in Birmingham, Alabama would be closed effective December 31, 1989. The Respondents were told that the RDC facility would be converted to a Home Delivery Center ("HDC"). Petitioner's App. A., p. A6. The RDC facility included, among other things, home delivery, warehousing, and customer service functions at the Omega Street facility. Respondents were told that the effect of converting the RDC to an HDC would be to retain the home delivery function of the RDC and eliminate all other jobs at the Omega Street facility. The Respondents' jobs were part of the warehousing function of the RDC. The Respondents were told that their jobs would be eliminated effective December 31, 1989, and if they did not accept the severance package being offered, which required executing the releases and waivers, they would be permanently laid off effective December 31, 1989 with no severance benefits. The Respondents were told they had no choice. The Respondents were told it would do no good to have a lawyer review the terms of the severance package or the releases or waivers because the decision had already been made.

In fact, the Respondents' jobs were not eliminated but were filled by employees who were either younger or had less seniority. In fact, Sears permitted some employees to revoke their acceptance of the severance program and repudiate their previously signed releases and waivers. Respondents were denied reinstatement and the opportunity to revoke their releases and waivers, although other employees were permitted to do so. The timing of Sears' decision to "restructure" the Omega Street operation into a combined HDC and Cross-Dock Center (thus preserving the jobs in the warehouse for all employees except the Respondents) is likewise an issue in this case which is subject to dispute.

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fraud, duress, or otherwise involuntary, the retention of severance pay absolutely bars the Respondents from maintaining their ADEA action.

These factual matters are in dispute and undoubtedly, the Petitioner will not agree with Respondents' statement of the case. However, the Respondents set forth these disputed facts to demonstrate the inaccuracy of Petitioner's characterization of the events which culminated in Respondents' signing releases and waivers. Petitioner's characterization that "Respondents voluntarily accepted the severance package" is entirely inappropriate and inaccurate.

Finally, the Petitioner states that the Respondents' lawsuit "asserts that the releases were defective, however, because they were allegedly based upon misrepresentations as to what would be the fate of the Birmingham facility." Respondents' lawsuit does make this assertion. However, Respondents' complaint also asserts allegations of numerous other misrepresentations, which include, among others, the terms of the severance package itself; the legal effect of accepting the severance program being conditioned upon signing the releases and waivers; and whether the Respondents' acceptance was voluntary.

REASONS FOR DENYING THE WRIT

Review by this Court of the decision below is neither necessary nor warranted. *First,* the issue of whether an employer should be permitted to coerce older workers protected by the ADEA to voluntarily retire through fraud and duress is not the question before the Court. The ADEA obviously does not allow this. *Second,* the ability to disavow scrutiny under the ADEA based upon a *voluntary* release and waiver when the employees did not "tender back" the consideration is not one of national importance, nor is it the question before the Court. For purposes of appeal, the Petition states that even employees who have executed *involuntary* releases and waivers obtained by fraud should "tender back" consideration. *Third,* the Eleventh Circuit's opinion does not conflict either directly or "in principle" with the other circuits because those circuits did not consider *Hogue. Finally,* the Eleventh Circuit's

decision is clearly consistent with the overall scheme and purpose of the ADEA which is to protect older workers from being forced or coerced to retire involuntarily. The Eleventh Circuit's reliance upon *Hogue v. Southern Railway Co.*, 390 U.S. 516 (1968), neither calls into question the validity of *Hogue* nor represents an unwarranted extension of that holding.

A. THE DECISIONS OF OTHER CIRCUIT COURTS WHICH PETITIONER RELIES UPON DO NOT CREATE A CONFLICT REQUIRING RESOLUTION BY THIS COURT.

Petitioner relies upon *Grillet v. Sears Roebuck & Company*, 927 F.2d 217 (5th Cir. 1991) and *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 117, 116 L.Ed.2d 139 (1991), for the proposition that the Eleventh Circuit's opinion in this case creates a conflict which requires resolution by this Court. Both of these cases are readily distinguishable from the instant case and neither creates a conflict requiring resolution by this Court. Neither *Grillet* nor *O'Shea* considered *Hogue* and what effect it would have on those cases. In *Grillet*, the Fifth Circuit addressed the "ratification" and "tender back" issue presented there in terms of the "federal common law" of commercial contracts without regard to the principles set forth in *Hogue*. In *O'Shea*, the Fourth Circuit applied the common law of Maryland as regards the application of that state's law governing "ratification" and "tender back."[4]

[4]Neither the Petitioner nor the Respondents differ that the issue of the validity of the releases and waivers and the application of "ratification" and "tender back" principles are questions of federal law, not state law. The district court's denial of the Petitioner's Motion for Summary Judgment was premised upon the common law of Alabama, in response to the legal theory advanced by the Petitioner. The Petitioner contended in its Motion for Summary Judgment that the application of the common law of Alabama on "ratification" and "tender back" required a judgment in Petitioner's favor as a matter of law. The district court, properly, rejected that position.

It was not until *Grillet* was decided, which occurred after Petitioner's Motion for Summary Judgment had been denied, that the Petitioner advanced

Admittedly, the results reached by the Fifth and Fourth Circuits in *Grillet* and *O'Shea*, respectively, were contrary to the result reached by the Eleventh Circuit in the instant case. However, neither *Grillet* nor *O'Shea* considered the effect of *Hogue* nor was there any consideration as to whether the principles enunciated in *Hogue* were applicable to the circumstances presented in those cases. Neither case rejected *Hogue* nor declined to apply the principles enunciated in *Hogue*. Consequently, the Eleventh Circuit's reliance upon *Hogue* in this case does not present a conflict among the circuits requiring resolution of a controlling legal principle by this Court.

Petitioner also references *Janneh v. GAF Corp.*, 887 F.2d 432 (2nd Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S.Ct. 177, 112 L.Ed.2d 141 (1990), and *Cumberland & Ohio Co. v. First American National Bank*, 936 F.2d 846 (6th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 878, 116 L.Ed. 783 (1992), as conflicting "in principle" with the Eleventh Circuit. This reference is wholly specious. In *Janneh*, the plaintiff initiated a lawsuit and subsequently authorized his attorney to accept the defendant's counteroffer of settlement in the amount of $3,000. In *Janneh*, there was no claim that GAF coerced the plaintiff into settling, rather, the plaintiff claimed his own attorney coerced him into settling through "civil pressure." The Second Circuit enforced the term of the agreement and held that this claim of coercion was frivolous. There was no issue of an ADEA release.

In the instant case, the Petitioner coerced[5] Respondents to retire involuntarily and extracted the releases and waivers at a time when Respondents were not represented. Indeed, Re-

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the theory that federal, not state, law controlled using that theory as the basis for Petitioner's Motion for Reconsideration before the district court. On appeal, the Petitioner similarly advanced that the issues presented were matters of federal law.

[5] Whether Sears in fact coerced respondents is a matter of dispute. However, Sears' legal position on Summary Judgment and before the court below assumed the allegations of fraud and coercion to be true.

spondents had no reason to believe their retirements and "voluntary" resignations had been obtained through fraud and misrepresentation until approximately January 16, 1990 when they learned that their jobs had not been eliminated. Respondents took immediate and definitive action to revoke their resignations and repudiate the releases and waivers upon which Petitioner now relies. Respondents immediately requested reinstatement. Respondents filed their EEOC charges within several weeks of learning that their retirements and the required releases and waivers had been obtained through misrepresentations and fraud.

Further, the Sixth Circuit decision cited by Petitioner as "conflicting in principle," *Cumberland & Ohio Co.*, 936 F.2d 846 (6th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 878, 116 L.Ed. 783 (1992), is not an ADEA case and was decided under Tennessee law rather than federal common law.

B. THE DECISION BELOW DOES NOT RAISE ANY IMPORTANT QUESTION OF FEDERAL LAW WHICH REQUIRES RESOLUTION BY THIS COURT.

That the voluntary resolution of disputes, regardless of the nature of the dispute, should be promoted by our legal system as a matter of public policy is not a proposition with which the Respondents take issue. Nor was it the legal issue before the court below or properly presented to this Court. Petitioner's attempt to posit the issue before this Court as to whether application of the "tender back" principles supports or denigrates the policy encouraging voluntary resolution of disputes is a fiction.

The issue ultimately to be decided in the trial of this action is *not* whether the ADEA does, or should, permit an employee, or former employee, to avoid the effects and consequences of a *voluntary* settlement, *voluntary* release and waiver, or *voluntary* retirement. Rather, the real issue in this case is whether the Respondents' retirements were, in fact, voluntary or involuntary and thus violative of the ADEA.

There are, not surprisingly, serious questions of disputed fact requiring a trial to resolve these issues. The Petitioner does not, and cannot, seriously contend otherwise. Thus, for the Petitioner to posit before the Court the proposition that the Eleventh Circuit's decision threatens *voluntary* resolutions of disputes contrary to the overriding public policy of encouraging *voluntary* resolutions of disputes is wholly fictional. The voluntariness of the Respondents' actions in this case is the sum and substance of this case which has yet to be resolved and cannot be resolved without a trial.

The Eleventh Circuit correctly stated the position of the parties in the court below as follows:

> Sears argues that even if the releases were tainted by misrepresentation or duress, the Retirees ratified them as a matter of law by accepting the benefits of the bargain. Sears insists that the Retirees cannot be allowed to retain the severance benefits at the same time they deny Sears the benefit of its bargain by maintaining this lawsuit. The Retirees contend that the tender back of their severance benefits is not an absolute requirement.

Forbus v. Sears, Roebuck & Co., 958 F.2d 1036, 1040 (11th Cir. 1992).

If the Eleventh Circuit's decision presents any policy issue it is whether or not an employer should be permitted under the ADEA to obtain involuntary retirements and releases and waivers induced by fraud, misrepresentations and duress and then to avoid the consequences of such illegal acts by requiring the retirees to tender back the severance pay as a precondition to filing suit. If, in fact, the Eleventh Circuit's decision is construed as a balancing of competing interests, then the balance struck by the Eleventh Circuit is clearly the correct one and consistent with the purposes of the ADEA.

If, employees seeking to disavow ADEA releases is a recurrent question of national importance, as Petitioner suggests, then it is not because of the application or non-application of

the "tender back" rule. Rather, it is because of the circumstances, or alleged circumstances, under which such releases are obtained. The enactment in 1990 of the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626(f), does, indeed, underscore the importance of *voluntary* settlements and waivers in the ADEA enforcement scheme. But what it underscores is the necessity that the waiver obtained be *voluntary* and not tainted by fraud, duress, or coercion.[6] It is the voluntariness of the Respondents' retirements and executing the releases and waivers which the Respondents seek to have tried, and are entitled to have tried, since there are disputed facts.

The Petitioner seeks to have the tables turned and have this Court adopt a policy which, rather than encouraging voluntary settlements, as are favored in the law, would encourage involuntary releases and involuntary retirements, otherwise violative of the ADEA, and immunize employers from potential ADEA liability if the victims of such illegal conduct do not tender back the severance pay as a precondition to filing suit. The Eleventh Circuit's decision is in no way contrary to, nor does it implicate, any policies favoring the voluntary resolution of disputes. Employers need not be concerned in effectuating so called downsizing policies if those policies are indeed voluntary and meet the requirements of the ADEA, as amended by the OWBPA.

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[6]There can be little doubt that Congress enacted the OWBPA, as an amendment to the ADEA, precisely in response to concerns over employer overreaching and involuntary waivers such as the response alleged occurred in the instant case. Thus, both Congress and the Eleventh Circuit, (albeit in different contexts), have struck a balance disfavoring involuntary releases and waivers obtained by employers through fraud and duress. The OWBPA, amending the ADEA, was enacted on October 16, 1990 approximately one year after the events which gave rise to this action occurred.

C. THE COURT BELOW NEITHER MISCONSTRUED NOR MISAPPLIED A DECISION OF THIS COURT.

The Petitioner complains that the Eleventh Circuit misconstrued and misapplied this Court's reasoning in *Hogue*. The Eleventh Circuit's rationale, reasoning, and holding based upon the application of Hogue is clear, concise, and compelling. It needs no further amplification, explanation, or justification here.

CONCLUSION

For all the foregoing reasons, Sears' Petition for Writ of Certiorari should be denied.

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